

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Chapter 11 Case
THE TRAVELOT COMPANY)	
)	Number <u>02-40020</u>
<i>Debtor</i>)	

ORDER ON MOTION FOR CLARIFICATION OR RECONSIDERATION

Debtor filed a Motion for Clarification or Reconsideration of this Court's August 8, 2002, Order setting a deadline for Debtor to decide whether to assume or reject a contract with CNN. The Motion seeks: (1) clarification that this Court's interpretation of the contract language in ruling on the Motion is not "conclusive" and will not have "collateral estoppel" effect in any other litigation; (2) direction that the \$1 million required to be deposited in the registry of this Court "not be released" to CNN until final disposition of pending litigation in the Superior Court of Chatham County; (3) modification of the ruling with respect to the construction of the word "content." My conclusions, and the modifications of my Order of August 8, 2002 necessitated by those conclusions, are set out below.

(1) No estoppel effect was intended as to the issue of breach.

In the August 8 Order, I limited my conclusion as to the possibility of breach as follows:

I conclude, *for the purposes of this Motion*, that when CNN reserved to itself the right to place travel “content” from companies other than Travelot on its website, it retained the right to place interactive links from Orbitz, et. al. to the clearly identified websites of Orbitz, et. al. . .

Order, at p. 13 (Aug. 8, 2002) (emphasis added). Neither Debtor nor CNN is precluded from litigating the issue of breach of the contract in the litigation pending in Superior Court.

(2) The request that the \$1 million payment not be released to CNN is premature.

Debtor’s request will be addressed in any order handed down on Debtor’s potential motion to assume. That is, if Debtor requests assumption and this Court orders it over CNN’s objection, that order will delineate the timing of release of payments to CNN and may condition those payments on certain actions by CNN.

(3) Debtor is correct in asserting that the interpretation of “content” in the August 8 Order improperly equated “content” with the express contract definition of “Travel Content.”

In the August 8 Order, I correctly concluded that “content” included the possibility of interactivity. However, my conclusion that “CNN’s inclusion of Orbitz, et.al., links to non-CNN websites for booking online travel has not been shown to constitute a breach by CNN of the Travelot contract,” Order at 13, did not consider the distinction between “content” and “Travel Content” as those terms were used in the contract. Accordingly, it is appropriate to revisit the issue of breach insofar as it relates to my conclusions in the August 8 Order.

The Contract Term Sheet defines “Travel Content” in the first paragraph:

CNN hereby deems Company as its premier travel booking functionality provider for the English language edition of the domestic CNN websites Company hereby grants CNN a non-exclusive right to use, publish and display its *travel booking functionality, travel and travel related content, including text, still pictures, graphical logos, navigation and video that is provided by Company (the “Travel Content”)*.

Term Sheet ¶ 1.1 (emphasis added). The use of the capitalized “Travel Content” throughout the Term Sheet is consistent with paragraph 1.1, in that it refers only to Debtor’s travel content. The intended scope of Debtor’s “Travel Content” as defined in paragraph 1.1 is not pertinent to this proceeding. However, the fact that the capitalized expression “Travel Content” consistently refers to Debtor’s material, whereas the generic and contractually undefined word “content” is used to encompass material of sources other than, or in addition to, Debtor, is an important distinction.

A subsequent contract provision grants Debtor semi-exclusivity as to “booking functionality” that CNN is permitted to provide on its websites:

CNN agrees not to place booking functionality from Orbitz, Travelocity, Expedia or Priceline on the CNN Sites; however, CNN reserves the absolute right to use content from other sources and will retain absolute editorial discretion with regard to its selection and use of any and all content on the CNN Sites, including the Travel Content.

Term Sheet ¶ 5.1 (emphasis added). In this provision, CNN agreed not to place “booking functionality” from four named sources (hereinafter “Orbitz, et.al.”) on its websites, but CNN otherwise reserved the right to place “content” from any source, including Orbitz, et. al., on those sites. It also reserved editorial control over “all content,” including “Travel Content.”

Paragraph 5.1 is both broadly permissive in granting CNN the right to use “content” taken from all sources other than Debtor and precisely preclusive in carving out a discrete portion of that “content” and prohibiting its use from the four named sources. Use of “content” in paragraph 5.1 indicates that CNN was entitled to use any material supplied by sources other than Travelot, subject to a single limitation: CNN was not to place “booking functionality” of the four named sources on its websites. This appears to be Debtor’s sole enforceable limitation on CNN’s use of its own websites.

Debtor had obtained in paragraph 1.1 only a “non-exclusive” right to display its “Travel Content” which includes “travel booking functionality,” on CNN websites. In paragraph 5.1 “Company [Travelot] Exclusivity,” however, CNN agreed not to place “booking functionality” (part of “Travel Content”) from Orbitz, et.al. Thus, Debtor did obtain an exclusivity agreement as to part of its “Travel Content” - the “travel booking functionality” part. CNN’s reservation of the right to use “content” from any sources must necessarily include only that portion of “content” which lies outside the “travel booking functionality” zone. Therefore, CNN may allow Orbitz, et.al., to display interactive content

only so long as there is no possibility of performing any travel booking by means of that interactive content.

(4) To the extent that my Order of August 8, 2002, found that CNN had not breached paragraph 5.1 of the Contract Term Sheet, I now vacate that finding.

Because “content,” as used in the contract, includes navigation and interactivity, CNN was allowed to permit Orbitz, et.al., to display interactive content so long as there was no possibility of breaching the exclusivity provision of paragraph 5.1 by permitting any travel booking on the CNN websites. In that the Court has heard evidence, not yet quantified, that the CNN site has at times permitted such options to one or more of the four entities named in paragraph 5.1, it would appear that CNN has breached the contract.

(5) The deadline set by the Court for Debtor to deposit \$1 million in the registry of the Court is appropriate and remains unchanged.

My finding of no breach by CNN in the August 8 Order, although a major factor in that decision, was not the sole factor, and the vacating of that finding does not affect my Order that Debtor must deposit \$1 million into the registry of the Court. Debtor wishes to delay a decision until confirmation or until resolution of litigation it has filed against CNN in Superior Court. That may take years, and CNN should not be held indefinitely in suspense as to whether performance under this contract will proceed. The CNN contract is Debtor’s sole asset. Debtor may lose the suit against CNN. Even if it wins, Debtor could decide to reject the contract, keep the damage award, and leave CNN to start over from scratch. That would be unconscionable.

Debtor is in Chapter 11 for the purpose of reorganizing. It must decide now whether to pursue its dream by assuming the contract, or whether simply to pursue litigation of its damage claim against CNN. Debtor has repeatedly assured this Court that it has the financial wherewithal to perform. It is time either to demonstrate that ability and keep the prospect of reorganization alive, or to go a different route.

The deadlines set in this Court's August 8, 2002, Order, as amended August 20, 2002, remain unchanged.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 26th day of August, 2002.